IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 22 of 1984

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMAJIAMBARAMTHAKAR - Appellant(s)

Versus

STATEOFGUJARAT - Defendant(s)

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Appearance :

MR DD VAIDYA FOR MR ND NANAVATI for Appellant(s) : 1,
MR LB DABHI, AGP, for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 05/10/2005

ORAL JUDGMENT

1. This Second Appeal is preferred against the judgment and decree passed in Civil Regular Appeal No.48 of 1982, by learned District Judge, Junagadh, on 20th

August, 1983. The said appeal arose out of a judgment and decree rendered by learned Civil Judge (S.D.), Junagadh, in Regular Civil Suit No.936 of 1975 on 30th September, 1981. The appellant was the plaintiff in the suit and the suit came to be dismissed. He, therefore, preferred the Regular Civil Appeal before the District Court and the appeal came to be dismissed and, therefore, this Second Appeal by the original plaintiff.

2. For the sake of convenience, the appellant is addressed to as “the plaintiff” and the respondent is addressed to as “the defendant” in this judgment.

3. The facts of the case, in brief, are that the plaintiff purchased a house known as Pasayatawala in auction held on 22nd January, 1974, as the highest bidder. The said auction sale was objected to by one Kathadbhai Amrabhai before the Collector on the ground that the first scheduled auction after advertisement was to be held on 21st November, 1973, which was not held for whatever reasons and the auction in question, which was held on 22nd January, 1974, was without due publication and, therefore, he could not remain present or bid at the auction. He expressed his readiness to offer more price

of the house than the price at which the house was sold to the plaintiff.

3.1 The said objection was turned down by the Collector and auction sale to the plaintiff was confirmed. Aggrieved by the said order, the said Kathadbhai Amrabhai approached Special Secretary (Revenue) with an appeal/revision under Section 203 of the Land Revenue Code, which was registered at SSRD/RTVA-8/75, which was later treated as a Revision under Section 211 of the Code.

3.2 The said appeal/revision was accepted by the Special Secretary on the ground that the mandatory requirement of Section 167 of the Land Revenue Code was not complied with. The auction was notified lastly on 3rd January, 1974 and the auction could not have been held until expiry of 30 days therefrom, whereas it was held on 22nd January, 1974 and, therefore, the auction proceedings were irregular. The sale was, therefore, set aside and the matter was remanded to the Collector for fresh proceedings.

3.3 Aggrieved by the said decision of the Special

Secretary, the plaintiff preferred Regular Civil Suit No.936 of 1975 for declaration and injunction. The said suit was for declaration that the order of the Special Secretary is illegal, void, without jurisdiction and ineffective with a further prayer that the said order may not be acted upon and for a declaration that the plaintiff has become absolute owner of the suit property.

3.4 In the suit, an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure was also preferred, at Exh.5, praying for injunction and ad-interim relief was granted, which was confirmed after hearing both the sides.

3.5 The learned Trial Judge, after considering the evidence led by the parties, found no merits in the suit, keeping in light the provisions contained in the Land Revenue Code. The learned Judge observed that, factually, the auction sale was conducted in less than the permissible time limit and, therefore, there was no defect in the order of the Special Secretary when he set aside the order of the Collector confirming the auction sale and dismissed the suit.

3.6 The said judgment and decree was challenged in First Appeal before the District Court and the District Court also confirmed the view taken by the learned Civil Judge and dismissed the appeal.

4. Learned Advocate, Mr. Vaidya, for the appellant submitted that the auction was confirmed by the Collector, who was the competent authority and the Special Secretary erred in exercising his powers only on a technical ground. He submitted that the objection raised by the objector was only limited to his readiness to offer more price and not any technical flaw or irregularity in the sale. He submitted that no material irregularity, mistake or fraud is alleged, which could be the only ground for setting aside the auction and, therefore, the sale ought not to have been set aside by the Special Secretary. He submitted that, both the Courts below have erred in not appreciating this aspect and they turned down the case of the plaintiff.

4.1 Learned Advocate, Mr. Vaidya, submitted that the plaintiff has become the owner of the property by the said auction sale. He is in occupation thereof for decades by now and, therefore, on technical grounds, he

may not be thrown out of the property. He has also spent money for improvement of the property. Mr. Vaidya, therefore, submitted that this appeal may be allowed.

5. Learned Assistant Government Pleader, Mr. Dabhi, has opposed this appeal. He has drawn attention towards Section 167 of the Bombay Land Revenue Code. He submitted that the provision contained therein is mandatory because it starts with a non-obstante clause. He submitted that the plaintiff's case on question whether there is material irregularity in conduct of the auction or not is a pure question of fact and there is no dispute on the factual aspects. Both the Courts have given concurrent findings against the plaintiff-appellant and, therefore, this Court may not interfere with the concurrent findings of fact by both the Courts below. He submitted that it is only a question of application of law to the facts of the case.

5.1 On the aspect that the plaintiff has been occupying the suit house after auction purchase for nearly three decades, Mr. Dabhi submitted that he cannot confirm that the plaintiff is in occupation of the property in question. He submitted that the auction had

been held to be illegal and, therefore, the possession of the plaintiff, if any, is not relatable to a legal right. He, therefore, submitted that efflux of time by itself may not be considered as a ground for entertaining the appeal. He submitted that the appeal may be dismissed.

6. Before proceeding to appreciate rival side contentions, it would be appropriate to record certain dates, which are not in dispute :

(1) First auction fixed was fixed on 21st November, 1973, which could not be conducted for whatever reasons.

(2) Notice regarding next date of auction was published/notified lastly on 3st January, 1974.

(3) The auction in question took place on 22nd January, 1974, which is a period prior to expiration of 30 days from the latest date on which notices were affixed as required under Section 166 of the Bombay Land Revenue Code.

7. Section 167 of the Bombay Land Revenue Code runs as under :-

*"**167. Sale by whom to be made**:- Sales shall be made by auction by such persons as the Collector may direct.*

***Time when sale may be made**:- No such sale shall take place on a Sunday or other general holiday recognized by the Provincial Government nor until after the expiration of at least thirty days in the case of immovable property, or seven days in the case of movable property, from the latest date on which any of the said notices shall have been affixed as required by the last preceding section.*

***Postponement of sale**:- The sale may from time to time be postponed for any sufficient reason. "*

8. The question that this Court has to examine is whether revisional powers could not have been exercised by the revisional authority once finality was given by a competent authority to the auction sale and whether such order can be said to be outside the scope of jurisdiction of the revisional authority.

9. The provisions contained in Section 167 of the Code make it clear that no sale shall take place on a Sunday or other general holidays recognized by the State Government **nor until after expiration of at least**

thirty days in case of immovable property.....from the latest date on which any of the said notices shall have been affixed as required by last preceding section, i.e. Section 166 of the Code. The language employed in the section itself makes it clear that this provision is intended to be mandatory.

9.1 Undisputedly, this provision has not been adhered to while conducting the auction. This aspect appears to have been overlooked by the Collector when he rejected the objection of the objector and confirmed the sale. It may be that the objector did not raise this contention before the Collector, but provision of law still remains applicable and when the revisional authority noticed this aspect when the order of the Collector was challenged before it, the authority was justified in rectifying that error. Revisional powers were exercised by the Special Secretary as contained in Section 211 of the Code. Section 211 of the Code authorises the revisional authority to examine legality or propriety of any decision or order passed and examine the question as to regularity of the proceedings before such officer. Thus, it was open for the revisional authority to examine the question as to whether the

Collector was right in confirming the sale when there was irregularity in conducting the auction, as it was in breach of the mandatory provision of Section 167 of the Code. Both the Courts below have, therefore, rightly turned down the case of the plaintiff-appellant by applying the provision of law to the facts of the case. It has t be borne in mind that civil courts exercise regulatory jurisdiction while examining an official order. What is required to be examined, therefore, is, whether the authority had jurisdiction to pass the order and whether jurisdiction is used as per law. There is no dispute on factual aspects and when there are two concurrent findings of Courts below, no interference is called for at the hands of this Court in this Second Appeal. The order of the Special Secretary cannot be said to have been passed beyond the scope of his jurisdiction nor can it be said to have been exercised against the provision of the Code. The Courts below were justified in upholding the same by dismissing the suit and the appeal.

10. Now comes the question whether a different view can be taken by this Court on the ground that the plaintiff is in possession of the suit property for

nearly thirty years. With all the sympathies for the plaintiff-appellant, it has to be observed that the auction having been found to have been not held in accordance with the provision of Section 167 of the Code and having been set aside by the Special Secretary, which is confirmed by two courts below and even this Court for the reasons stated hereinabove, a different view is not possible to be taken. Efflux of time would not change the nature of an act or vice versa. It is not possible to accept this appeal on sympathetic but irrelevant considerations. The appeal, therefore, fails and is dismissed. No costs.

[A. L. DAVE, J.]

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